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COURT OF APPEALS
STATE OF NEW YORK

FREEDOM MORTGAGE CORPORATION,

Appellant,

-against-

NO. 1

HERSCHEL ENGEL,

Respondent.

20 Eagle Street
Albany, New York
January 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

BRIAN A. SUTHERLAND, ESQ.
REED SMITH LLP
Attorney for Appellant
599 Lexington Avenue
22nd Floor
New York, NY 10022

ANTHONY R. FILOSA, ESQ.
ROSENBERG FORTUNA & LAITMAN, LLP
Attorney for Respondent
666 Old Country Road
Suite 810
Garden City, NY 11530

Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: We'll begin with the first,
2 appeal number 1, which is Freedom Mortgage Corporation v.
3 Engel.

4 Good afternoon, counsel.

5 MR. SUTHERLAND: Good afternoon, Your Honors.
6 May it please the court, I'm Brian Sutherland for
7 appellant, Freedom Mortgage. I'd like to reserve two
8 minutes for rebuttal, please.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. SUTHERLAND: Thank you. The filing of a
11 stipulation to discontinue revokes the lender's prior
12 election to accelerate, because the filing is an overt act
13 that is evidence of and discloses the lender's choice to
14 stop seeking immediate payment in full.

15 Under the common law, if a contract does not
16 specify just - - -

17 JUDGE RIVERA: A question. Chief, I have a
18 question.

19 CHIEF JUDGE DIFIORE: Yes, Judge Rivera.

20 JUDGE RIVERA: Thank you. All right. So the - -
21 - the stipulation and the voluntary - - - and the
22 discontinuance may be for a variety of reasons. If it's
23 actually silent as to acceleration or deceleration, how is
24 a court to ever assess whether or not it really is the
25 basis for the stip?



1 MR. SUTHERLAND: Well, two answers to that, Your
2 Honor. First, any time that the lender discontinues,
3 whether or not it has multiple potential reasons for doing
4 so, it is going to want to decelerate or elect to revoke
5 the acceleration in any one of those scenarios.

6 So one might be that the lender expects that the
7 borrower will resume making payments. Or another reason,
8 the one that the Second Department perhaps has in mind,
9 will be that the lender wants to fix a procedural issue
10 with the case.

11 But in either one of those situations, it has to
12 revoke the election to accelerate in order to do that. And
13 so the discontinuance is evidence of election, regardless
14 of the underlying motivation.

15 And the court should keep those two questions
16 separate. First, did we make a choice? Have we elected to
17 revoke? And then separately, if there's a question about
18 abusing the judicial process in some way, that should be
19 addressed after the court resolves the question of whether
20 we have revoked and ask whether the borrower has
21 demonstrated that the revocation would cause substantial
22 prejudice.

23 Now turning to the second part of Your Honor's
24 question, the stipulation here is not silent. It points
25 directly to the foreclosure complaint and it says we are



1 withdrawing the only vehicle by which a claim for
2 acceleration was made.

3 So it is saying to the world that the allegations
4 in that complaint are not ones that we are seeking to
5 enforce or prove any longer.

6 And what the Second Department did here was look
7 at the stipulation in a vacuum. It didn't read it together
8 with the foreclosure complaint, and it said, well, where is
9 the terms of the loan? But parties wouldn't ordinarily put
10 the terms of the loan or statements about whether they'll
11 be accepting monthly installments or not in a document that
12 is going to become a court order.

13 If they do that, the terms of the loan are then
14 part of a court order and subject to judicial supervision.
15 And then there could be a contempt motion because Mr. Engel
16 didn't pay his monthly installments, or maybe he's bringing
17 a contempt motion against us because we're not accepting
18 his monthly installments.

19 So the parties aren't going to want to put the
20 terms of the loan in a stipulation to discontinue.

21 Also, at 2013, the time of the stipulation to
22 discontinue - - -

23 JUDGE FAHEY: Judge - - - Judge, I have a
24 question.

25 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.



1 JUDGE FAHEY: Thank you.

2 Mr. Sutherland, one of the distinctions that is
3 drawn by the Second Department opinion and in some of the
4 briefs is the distinction between the note and the
5 foreclosure action. And the way I understand that argument
6 is, is that the basis of the right to accelerate the debt
7 is in the note, in the contract, and the basis - - - and
8 the foreclosure action simply is a separate proceeding and
9 can't - - - you cannot use a judicial remedy like a
10 foreclosure action for failure to do something as the basis
11 of a contract action. And that appears to be what's being
12 done here.

13 That problem may be solvable. But it seems that
14 what they've suggested is it's solvable by simply providing
15 notice to any party, and the notice would be that you've
16 got to expressly say what you're doing when you do it.

17 MR. SUTHERLAND: Well, yes. If the problem is
18 solvable simply by giving notice, that presupposes that we
19 have the power to revoke - - -

20 JUDGE FAHEY: Yeah - - -

21 MR. SUTHERLAND: - - - which is something - - -

22 JUDGE FAHEY: - - - but that - - - that's not my
23 point, though.

24 MR. SUTHERLAND: Yes, Your Honor.

25 THE COURT: My point is, is that your position



1 requires an implicit understanding of the accelerated debt
2 and the voluntary disclosure as - - - excuse me, the
3 voluntary discontinuance, and that should be - - - and
4 their point is, as I understand it, is it must be express.

5 And if you think about it in a larger context, in
6 this court's jurisprudence on contract law, it pretty
7 consistently talks about the express nature of contracts
8 and that whenever anyone's rights are in play, that you
9 have to expressly lay it out. And once you do that, once
10 you've expressly done that, then you may go ahead and
11 voluntarily discontinue.

12 That's the way I understand it. And so wouldn't
13 it be more in line with our jurisprudence to acquire - - -
14 to require not that you cannot voluntarily discontinue and
15 to accelerate or not accelerate the debt, but that whatever
16 you're doing that it be expressly laid out there and not
17 implicitly laid out there?

18 MR. SUTHERLAND: Well, Judge Fahey, let me see if
19 I can answer your question. I think that this court's
20 jurisprudence doesn't say what a party must do to exercise
21 a right under their contract, and I'm referring to the
22 court's decision in Albertina Realty, which says we need
23 not decide just what a party must do to - - -

24 JUDGE FAHEY: Let me stop you there. Doesn't
25 Albertina Realty refer to an unequivocal overt act? And



1 the way I understand your argument is, is that the
2 voluntary discontinuance is an overt act; am I right about
3 that?

4 MR. SUTHERLAND: It is an overt act.

5 JUDGE FAHEY: Yeah. So - - -

6 MR. SUTHERLAND: Yes, Your Honor. If - - -

7 JUDGE FAHEY: - - - so let me take it further,
8 then. If that's the case, then how is the other party - -
9 - and - - - honestly, quite often, many of these people are
10 pro se litigants, how are they to know what's happening
11 without it being expressly stated in the discontinuance
12 itself? It doesn't seem to be any great burden on you.

13 MR. SUTHERLAND: Well, the burden that the Second
14 Department imposed didn't exist in 2013. But here's how
15 the borrower is to know. Even a pro se borrower, and Mr.
16 Engel certainly is not one; he's a nonresident landlord
17 real estate investor, and he has private counsel. But even
18 a pro se borrower knows that we have stopped an action for
19 immediate payment in full.

20 Given that we have stopped the action for
21 immediate payment in full, it stands to reason that we are
22 no longer seeking immediate payment in full.

23 The lender needs the judicial action in order to
24 obtain that immediate payment. Without that judicial
25 action, it cannot obtain the immediate payment. Or put



1 differently - - -

2 JUDGE FEINMAN: Chief if I may - - - I have a
3 question when he's done.

4 CHIEF JUDGE DIFIORE: Please continue your
5 answer, counsel, and then we'll move to Judge Feinman.

6 MR. SUTHERLAND: Yes, Your Honor. Just to
7 conclude, there's no rational reason for a lender to forego
8 the judicial enforcement and continue to seek immediate
9 payment in full. Certainly there's no evidence in this
10 record that Freedom Mortgage continued to seek immediate
11 payment in full after the discontinuance.

12 Yes, Judge Feinman?

13 JUDGE FEINMAN: I actually have two different
14 questions. And answer them in - - - at your leisure.

15 Part of your brief, I think, discussed the
16 nullification theory based on Loeb, but I don't hear you
17 arguing in that today. So is your principal argument going
18 to be the overt act of discontinuance and that theory?

19 MR. SUTHERLAND: The reason why Loeb is important
20 is important is because the common law provides that a
21 discontinuance nullifies the prior action, and even pro se
22 litigants are charged with knowledge of the common law.
23 And that's what makes the discontinuance particularly clear
24 evidence that the lender has made a choice.

25 But what Mr. Engel has argued is that the parties



1 need to enter into a contract to extend the limitations
2 period. And we reject that framework, because we're
3 dealing with different causes of action: one that accrued
4 in 2008 and one that accrued in 2013, if indeed we are able
5 to revoke an election to accelerate.

6 And so we think the question ought to be is there
7 evidence in this record from which a reasonable person
8 could conclude that Freedom Mortgage revoked its
9 acceleration? And part of that is the common law says that
10 when you discontinue a prior action, you are nullifying
11 what was done therein.

12 So it is, in fact, a clear message, especially to
13 a counseled borrower, that we are withdrawing and no longer
14 seeking to prove the allegations of the complaint. And
15 again, the complaint is - - -

16 JUDGE RIVERA: I have a question. Please, Judge,
17 I have a question.

18 CHIEF JUDGE DIFIORE: Please.

19 JUDGE RIVERA: So counsel, just to be clear, if -
20 - - if I take your argument to its logical conclusion, it
21 means that there would never be any limit on how often you
22 could accelerate and decelerate. You could do this every -
23 - - every other month that there's a default.

24 Is that your position, that there's never an end
25 to this? It seems to be somewhat beyond what any statute



1 of repose would allow for.

2 MR. SUTHERLAND: There two responses, Judge
3 Rivera. There's absolutely a limit. Separate the
4 questions whether we revoked from the question whether
5 equity should intervene to estop the revocation.

6 If a party is abusing the judicial process by
7 revoking again and again and again, then yes, equity should
8 absolutely intervene and stop that. But that is not what
9 happened here. Mr. Engel is the one who abused the
10 judicial process. He had actual knowledge of our
11 foreclosure complaint - - -

12 JUDGE RIVERA: Well, so how many times is - - -
13 do we say, now, that would just be inequitable; now that's
14 abuse? Because would you not be doing this every time
15 there's a default, which your position is, and I - - - it
16 doesn't seem wrong to me, on its face, that that is your
17 right under the agreements with the debtor.

18 MR. SUTHERLAND: It is our right. I'm only
19 acknowledging that there could come a time when a lender is
20 abusing judicial process. Certainly not our case. But the
21 scenario that some of the amici and I think Mr. Engel also
22 posit, is that the courts will necessarily be subject to
23 endless revocations followed by more accelerations, simply
24 will not occur, because the courts can act in equity to
25 block the revocation.



1 But that scenario is entirely distinct from the
2 question of whether any evidence of revocation exists in
3 the first instance.

4 JUDGE STEIN: Chief Judge, may I ask a question?

5 CHIEF JUDGE DIFIORE: Yes.

6 JUDGE STEIN: I just - - - I want to understand
7 this a little bit better. First of all, if a lender were
8 to continually discontinue or revoke its acceleration, the
9 - - - at least the periodic payments, say the monthly
10 payments, for which the statute of limitations would have
11 run, they are - - - they can no longer be sought the next
12 time they accelerate. Am - - - is that correct?

13 MR. SUTHERLAND: Yes, Your Honor, that's correct.

14 JUDGE STEIN: Okay, and - - -

15 MR. SUTHERLAND: And that - - -

16 JUDGE STEIN: I'm sorry. And - - -

17 MR. SUTHERLAND: Go ahead.

18 JUDGE STEIN: But the other thing is, is that I
19 just want to clarify as well that when you talk about
20 nullifying what's occurred in the action, you're not
21 necessarily - - - you're not null - - - you're not actually
22 nullifying the acceleration itself, but you're saying we
23 want to stop the acceleration that we did in this
24 complaint, and no longer seek to enforce it. Am I correct
25 in understanding you - - -



1 MR. SUTHERLAND: Yes, that's our position, Your
2 Honor.

3 JUDGE STEIN: Okay. Thank you.

4 MR. SUTHERLAND: I think the discontinuance is
5 particularly clear evidence of our choice. We're no longer
6 seeking immediate payment in full. And yes, it is an
7 important point. The two actions are different, because in
8 the section action, we are no longer seeking monthly
9 installments that are time barred.

10 So the two actions seek different amounts. The
11 acceleration in each one is a substantive condition
12 precedent to the borrower's obligation to pay and so that -
13 - -

14 JUDGE STEIN: And if the borrower has changed its
15 position in reliance on your acceleration, that - - - would
16 that give a court the authority to disallow it - - - or to
17 not recognize it as valid?

18 MR. SUTHERLAND: One hundred percent. That's the
19 Kilpatrick case and other cases that follow it. If the
20 borrower showed substantial prejudice in reliance on our
21 acceleration, then we could not accelerate again.

22 So I think there are at least two possibilities
23 for blocking a revocation in order to prevent the nightmare
24 scenarios that the borrower would posit: prejudice to the
25 borrower or abuse of the judicial process; either one,



1 absolutely not present in this case.

2 JUDGE RIVERA: Judge, if I can ask one last - - -

3 MR. SUTHERLAND: Invoking those - - -

4 JUDGE RIVERA: - - - question?

5 MR. SUTHERLAND: Yes, Your Honor.

6 JUDGE RIVERA: Please.

7 CHIEF JUDGE DIFIORE: Yes.

8 JUDGE RIVERA: Thank you.

9 So counsel, why - - - what is the burden in just
10 sending a letter to the debtor confirming you've
11 decelerated?

12 MR. SUTHERLAND: Well - - -

13 JUDGE RIVERA: What is so difficult about doing
14 that? That would make it clear to everybody what your
15 intent was. You wouldn't have courts wasting their time on
16 any of the equity issues in that way, other than, as you
17 suggest, if there's abuse.

18 Why not just do that? One piece of paper.

19 MR. SUTHERLAND: Those requirements didn't exist
20 in 2013. And if you think about it, a letter wouldn't have
21 been enough in this case, because a foreclosure action
22 would continue. The discontinuance is the only thing that
23 could stop the request for immediate payment in full,
24 because - - -

25 JUDGE RIVERA: But no, I'm saying, in addition to



1 the discontinuance, since you - - - I understand your point
2 that you don't want to include every term in whatever your
3 stipulation is. I understand that. It makes total sense.

4 But then why not put it in writing and archive it
5 that way, moving forward?

6 MR. SUTHERLAND: Well, you know, I think that the
7 Second Department had the same question and said, well, why
8 not include a whole bunch of different statements.

9 We could not have anticipated that requirement in
10 2013 when we discontinued. Yes, it's something that
11 lenders can do going forward. It's something that I assume
12 they are doing and will do going forward. The requirement
13 didn't exist then. And there was no reason to believe that
14 it did exist.

15 I think that the answer that I gave is probably
16 the most - - - the most explanatory one; that parties don't
17 want to put the terms of their agreement, including whether
18 they're going to accept monthly installments or not, in a
19 document that will become a court order. And that explains
20 why they didn't do it in 2013, Your Honor.

21 CHIEF JUDGE DIFIIORE: Thank you, counsel.

22 MR. SUTHERLAND: Thank you.

23 CHIEF JUDGE DIFIIORE: Counsel?

24 MR. FILOSA: Good afternoon, Your Honors, and may
25 it please the court.



1 A stipulation of discontinuance is simply a
2 contract to terminate a lawsuit. That said, when a
3 stipulation of discontinuance in a foreclosure action is
4 silent on the statute of limitations and doesn't contain
5 the borrower's express acknowledgement of the debt and
6 promise to pay, it cannot have any effect on the statute of
7 limitations.

8 And a court can't imply a revocation of an
9 acceleration into a stipulation which says no such thing.
10 You know, the - - -

11 JUDGE GARCIA: Chief, may I ask - - -

12 MR. FILOSA: - - - Freedom Mortgage has a notion
13 - - -

14 JUDGE GARCIA: - - - a question? Chief, may I
15 ask a question?

16 CHIEF JUDGE DIFIORE: Judge Garcia, yes.

17 JUDGE GARCIA: Counsel, would you agree, you
18 know, along the lines of the questioning that's just been
19 going on with your adversary, that if a letter or a notice
20 had been sent at the time of the stipulation, that would
21 have been sufficient?

22 MR. FILOSA: No, for the reason, again, that
23 there is no unilateral right of a party to affect the
24 statute of limitations.

25 So while the lender may de-accelerate, the



1 operation of that de-acceleration - - -

2 JUDGE STEIN: Judge, may I - - -

3 MR. FILOSA: - - - cannot affect the statute of
4 limitations.

5 JUDGE GARCIA: Just assume - - - assume that
6 argument is rejected for purposes of this question, what
7 would your answer be?

8 MR. FILOSA: It would require an unequivocal
9 overt act. And the mere - - - so yes, so if the letter
10 contains express language saying "we hereby de-accelerate
11 the loan; you may resume making monthly installment
12 payments of X, which we will accept," then yes.

13 JUDGE GARCIA: So how would that address the
14 problem of repeated acceleration and de-acceleration, if
15 the only extra step is to send the letter?

16 MR. FILOSA: Well, that's why I guess our - - -
17 our primary contention is that unilateral de-acceleration
18 cannot affect the statute of limitations, because again, a
19 litigant has no vested right to unilaterally manipulate the
20 statute of limitations. There is a means that the
21 legislature has prescribed - - -

22 JUDGE GARCIA: So really your whole argument is
23 premised on that first point, that - - -

24 MR. FILOSA: Right.

25 JUDGE GARCIA: - - - they have no right to



1 accelerate; they have no right to de-accelerate. And after
2 that, it's - - - you know, that's your primary argument.

3 MR. FILOSA: Well, they certainly have a right to
4 - - - they certainly have a right to accelerate under the
5 loan documents. It's that they have no right to
6 unilaterally de-accelerate as a means of extending or
7 manipulating the statute of limitations.

8 JUDGE GARCIA: I understand.

9 JUDGE FEINMAN: How - - - Chief, I have a
10 question.

11 CHIEF JUDGE DIFIORE: Yes, Judge Feinman?

12 JUDGE FEINMAN: How do you know whether they're
13 doing it to - - - I mean, doesn't that drag us into some
14 sort of morass of getting into their intent? Are they
15 intending to manipulate the statute of limitations? That's
16 part of the concern that I have about not having some
17 bright-line rule.

18 MR. FILOSA: So certainly. Under the - - - under
19 the rule announced by the Appellate Division - - - again,
20 here, let's not lose sight of the fact that a stipulation
21 of discontinuance is a contract governed by contract
22 interpretation principles.

23 So if there was an intention to revoke the
24 acceleration, the time and place to do so would have been
25 to expressly insert it into that discontinuance.



1 So really the rule advanced by - - -

2 JUDGE FAHEY: Judge - - -

3 MR. FILOSA: - - - Freedom Mortgage would - - -
4 would turn summary judgment jurisprudence on its ear, by
5 saying silence leads to a question of fact. But that's
6 just not consistent with our summary judgment
7 jurisprudence.

8 Silence in a contract doesn't create ambiguity.
9 An omission doesn't create - - -

10 JUDGE FAHEY: Judge?

11 MR. FILOSA: - - - an ambiguity.

12 CHIEF JUDGE DIFIORE: Counsel, is there any
13 evidence in the record that Freedom did not intend the
14 discontinuance to de-accelerate the debt?

15 MR. FILOSA: Yes. In fact- - -

16 CHIEF JUDGE DIFIORE: What is it?

17 MR. FILOSA: - - - there's - - - there's an
18 admission at Appendix 156 - - - this is Freedom Mortgage's
19 memorandum of law in support of their summary judgment
20 motion, where they disclose that the reason why the '08
21 action was discontinued was "the '08 action was eventually
22 set down for a traverse hearing, and discontinued four
23 years after the commencement of the action when the process
24 server was unavailable to testify."

25 So again, they were confronted with the potential



1 dismissal of the '08 action on personal jurisdiction
2 grounds. A dismissal on jurisdiction grounds does not
3 afford a lender the six-month savings of a statute of
4 limitations under 205(a). So they saw - - - perhaps saw
5 the writing on the wall, and said let me not double-down
6 and roll the dice on the traverse hearing.

7 So I mean, and that admission is again repeated
8 in the record at Appendix 163, where prior to the traverse
9 hearing the plaintiff stipulated to discontinue the '08
10 action due to the defective service on the defendant.

11 So again, the notion that a discontinuance is
12 always, as a matter of law, embodied - - - the embodiment
13 of an intention to allow the borrower to resume making
14 monthly installment payments, simply is just flatly
15 contradicted by this record.

16 And then even taking it out of the larger
17 context, both Mr. Engel and the Legal Aid Society amici
18 have cited collectively about a half a dozen cases where
19 lenders have discontinued because they find some procedural
20 defect with their action, be it a failure to serve the
21 ninety-day notice under 1304, the failure to acquire
22 personal jurisdiction, robo-signature documents, the
23 failure to verify the veracity of signatures.

24 So again, under the rule announced by the
25 Appellate Division, what's so unworkable about expressly



1 indicating to the debtor: we are revoking the acceleration
2 because we intend for you to resume making monthly
3 installment payments.

4 JUDGE WILSON: Chief, I have a couple questions,
5 if you'd allow me.

6 CHIEF JUDGE DIFIORE: Yes, of course.

7 JUDGE WILSON: Counsel, the answer you just gave
8 suggested to me that the lender's reason here was, in fact,
9 to revoke the acceleration so as to extend the statute of
10 limitations. So I'm not sure that the evidence in the
11 record you're pointing to supports the point you're trying
12 to make. But if you want to address that you can.

13 The question I have for you is this: putting
14 aside your argument about unilateral ability - - - so just
15 put that to the side for a minute. Assume that the lender
16 here has unilateral ability. What is the difference
17 between a rule - - - prospectively - - - a rule that says a
18 voluntary discontinuance of an action automatically revokes
19 an acceleration and a rule that says you must say in
20 writing to the borrower we are revoking the acceleration?
21 What is the practical difference between those two?

22 MR. FILOSA: Because in the absence of an express
23 indication to the borrower that the loan has been de-
24 accelerated, the borrower is none the wiser as to whether
25 it may resume making monthly installment payments and the



1 lender will accept them.

2 Because acceleration and deceleration affect such
3 a sea-change in the - - - in the debtor-creditor
4 relationship, under the loan documents, once a loan is
5 accelerated, a creditor has no obligation to accept monthly
6 installment payments. So if the borrower is essentially
7 left in the dark, in purgatory, as to whether they can
8 resume making monthly installment payments, for all we
9 know, a borrower (audio interference) be able to pay the
10 full accelerated amount but may be able to resume - - -
11 afford making the 2,000-dollar monthly installment payment.

12 So again, it - - - we beg the question: what's
13 so unworkable, in that circumstance, of a rule which simply
14 requires the creditor, if they intend to de-accelerate, to
15 expressly state that to the borrowers.

16 JUDGE STEIN: Chief Judge, if - - - may I follow
17 up on that - - -

18 CHIEF JUDGE DIFIORE: Judge Stein.

19 JUDGE STEIN: - - - question? Just following up
20 on Judge Wilson's question: but so what's the difference?
21 Because if the rule is, is that a stipulation of
22 discontinuance or a notice of discontinuance revokes the
23 acceleration, then the borrower will know that they can
24 make their monthly installment payments until such time as
25 the lender reaccelerates. And that's the rule.



1 So how - - - I don't understand how that leaves
2 the borrower in some kind of situation where they don't
3 know what the rule is. They make their payment, and unless
4 the bank gives another notice of acceleration, it's
5 accepted. And if it's not, then they can raise that in
6 court the next time that they're brought into court.

7 MR. FILOSA: Well, here, again, we have a - - -
8 we have a discontinuance - - - a stipulation, so - - -
9 which requires - - - it requires two to tango, so to speak,
10 here.

11 So you have Mr. Engel, who had every right to
12 insist upon going forward with the traverse hearing,
13 rolling the dice, if you will, and if he was successful
14 with that traverse hearing and the statute of limitations
15 had expired in the interim, the claim would undoubtedly
16 have been time barred, because there is no six-month
17 savings for a jurisdictional - - -

18 JUDGE STEIN: Well - - - well - - -

19 MR. FILOSA: - - - dismissal.

20 JUDGE STEIN: - - - unless the bank made a motion
21 to discontinue, and the court granted that motion. Doesn't
22 that put the borrower, again, back in the same position?

23 MR. FILOSA: Well, again, there, a motion for
24 discontinuance, if it's purely intended to avoid an adverse
25 result, I think the outcome would have been the same here.



1 A court can't - - - a litigant can't use a discontinuance
2 as a means of evading a possible adverse result. They made
3 their bed, they have to lie in it.

4 So they are, again, imposing - - - or by
5 implication, a waiver of a statute of limitations or - - -
6 or a revocation of the acceleration in a stipulation which
7 says no such thing, is in the context of Mr. Engel's loan,
8 inherently unfair, because he forfeited a potential
9 defense.

10 I guess in the larger context of borrowers in
11 general, the statute of limitations is not only a defense,
12 but it's the foundation of an affirmative right to relief
13 to discharge a mortgage, under RPAPL 1501(4).

14 I guess, for those two reasons, the need to
15 expressly indicate that is essential, because for all we
16 know, Mr. Engel would have never stipulated to it.

17 And the fact that I guess we have a virtual room
18 of lawyers here pondering whether he would or wouldn't,
19 really shows how unworkable the rule advanced by the bank
20 is, when it would have been very simple, had the parties
21 intended to do so, to embody that in their contract.

22 JUDGE WILSON: Chief, may I try again?

23 CHIEF JUDGE DIFIORE: Yes, Judge Wilson.

24 JUDGE WILSON: Counsel, I think that your answer
25 - - - it goes back to what Judge Garcia was asking at the



1 beginning, which is your whole argument depends on the
2 proposition that both Mr. Engel and the bank have to agree.
3 Otherwise I'm not - - - I still am not understanding what
4 the difference is between Mr. - - - between the bank
5 sending a letter saying we are unilaterally revoking the
6 acceleration and a a stipu - - - a rule that says a
7 stipulation does that.

8 MR. FILOSA: Well, again, if revocation - - -
9 because revocation has the effect of delaying, postponing,
10 or accruing the statute of limitations, that also
11 implicates New York public policy, right?

12 So for instance, under this - - -

13 JUDGE WILSON: Can that be done unilaterally?
14 That's the - - - the question is can that be done
15 unilaterally?

16 MR. FILOSA: And - - - and - - -

17 JUDGE WILSON: And it seems to me, you're - - -
18 you think not. But if the answer to that is it can be done
19 unilaterally, I'm not sure where your argument goes.

20 MR. FILOSA: Well, again, because - - - and I
21 guess so that simply begs - - - I guess, we can't avoid the
22 500 pound elephant in the room, so to speak, as to whether
23 it can be done unilaterally. And it would appear, under
24 Flagstar, at least unilaterally, as a means to have any
25 effect on the statute of limitations, the answer would be



1 no, because again, while Flagstar indicated that freedom of
2 contract is alive and well in New York, when the form or
3 effect of that contract would be to postpone or delay the
4 accrual of a claim under the statute of limitations, then
5 the freedom of contract must yield to the public policy
6 embodied by the statute of limitations.

7 And that's - - - that's the - - -

8 JUDGE STEIN: Chief Judge, may I ask a question?

9 MR. FILOSA: - - - very effect of de-
10 acceleration, is - - -

11 CHIEF JUDGE DIFIORE: Yes, Judge Stein.

12 JUDGE STEIN: Yeah, my question is, is did you
13 raise that in the Supreme Court, in this action?

14 MR. FILOSA: Well, in the essence - - - look,
15 this is a - - - that's a purely legal argument, under the
16 preservation jurisprudence, so I think the court can and
17 should reach it, because again, it's a purely legal
18 argument, which couldn't have been avoided by factual
19 counter-steps or any discovery.

20 It's really a question of interpreting an
21 unambiguous document, the stipulation of discontinuance, or
22 the loan documents themselves, holding them up against the
23 public policy of New York and against statutes such as CPLR
24 201, which say that no court may extend the statute of
25 limitations; statutes such as CPLR 203, which in essence



1 say that statute of limitations jurisprudence for a court
2 is a matter of simple arithmetic.

3 Find out when the claim accrued. Find out when
4 the - - -

5 JUDGE RIVERA: If may ask a question - - -

6 MR. FILOSA: - - - claim was - - -

7 JUDGE RIVERA: - - - Chief Judge? If I may ask a
8 question - - -

9 CHIEF JUDGE DIFIORE: Yes.

10 JUDGE RIVERA: - - -please? Thank you.

11 Okay, so counsel, if I'm understanding what
12 you're trying to argue here, putting aside the preservation
13 question for one moment, it seems your position is that you
14 get one shot at that acceleration, unless the parties then
15 agree that you get more than one shot at that acceleration.
16 Is that the way you view this?

17 MR. FILOSA: As a means of affecting the statute
18 of limitations, yes. Because - - -

19 JUDGE RIVERA: So then let me ask this. No, I
20 understand the rest of the argument.

21 So then let me ask this. And it may violate all
22 rules of contract that we understand, and mortgages. But
23 I'm just going to put it out there.

24 So why isn't it that what happens is that the
25 financial institution loses the opportunity to raise a



1 claim of - - - to assert acceleration, right, they lose
2 that right, but not the right to keep demanding payments?
3 So they can't call the whole debt in, but the debtor is
4 still on the hook for those installments. Why can't it be
5 viewed that way?

6 MR. FILOSA: Well, again, I mean, because - - - I
7 guess, because the operation of de-acceleration - - -
8 unilateral de-acceleration, would be to extend or postpone
9 the accrual of a claim, we have statutory provisions which
10 are entirely on point.

11 General Obligations Law 17-105. There, the
12 legislature has essentially prescribed a scheme for how
13 borrowers and lenders, if they truly intend to agree to de-
14 accelerate, can do so.

15 So the fact that the legislature went to the
16 trouble, if you will, of enacting this whole scheme, for a
17 court to recognize a practice - - -

18 JUDGE RIVERA: No, but all I'm saying is what - -
19 - again, what doctrines, what rules, would prevent one from
20 seeing what is extinguished is the right to seek
21 acceleration in the future, not the debt, not the promise
22 to keep paying the money that was borrowed, plus whatever
23 interest it is. That all that can be - - -

24 MR. FILOSA: Well, look, I guess, under - - -
25 under - - -



1 JUDGE RIVERA: - - - extinguished is the request
2 that I want it all paid now. I'm not going to do this in
3 installments; I'm not going to give you more time; I want
4 it up front?

5 MR. FILOSA: Again, look, I guess under our
6 statute of limitations jurisprudence, right, the expiration
7 of the statute of limitations just merely bars the remedy,
8 not necessarily the right.

9 So the remedy of foreclosure would be barred. I
10 guess the contract right, if Mr. Engel or any borrower was
11 so incline - - - inclined and so magnanimous, they could
12 continue to make payments. It's just that the right of
13 foreclosure would be extinguished. The right to invoke the
14 aid of the court to enforce that accelerated obligation
15 would be extinguished by the expiration - - -

16 JUDGE RIVERA: I'm not making myself clear, and
17 it may be because it's such an inappropriate way of
18 thinking about it, given our doctrines.

19 All I'm saying is, wouldn't that allow, though,
20 the lending institution to continue with every default to
21 seek the payment, as opposed to foreclosure? Just seek the
22 payment.

23 MR. FILOSA: Well, not necessarily, because,
24 look, under these loan documents, they're really a hybrid
25 instrument. Right? They start as an installment



1 obligation, where the borrower agrees to pay monthly
2 installments over the course of thirty years. Then when
3 the lender accelerates, it really becomes a demand
4 instrument.

5 There's no - - - when I accelerate, there's no
6 such th - - - further thing as monthly installments. It's
7 now one unitary obligation, which is due immediately. So
8 there's really no way of - - -

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. FILOSA: - - - putting the - - -

11 JUDGE FAHEY: Judge, can I - - -

12 MR. FILOSA: - - - toothpaste back in the tube,
13 so to speak.

14 JUDGE FAHEY: - - - can I have one last question
15 - - -

16 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

17 JUDGE FAHEY: - - - Judge? I know we're a little
18 over. Thank you.

19 Just so I'm clear on this. The voluntary
20 discontinuance, is that a product of a stipulated
21 settlement, or is it a one-party voluntary discontinuance
22 of the action? Do you understand what I'm saying?

23 MR. FILOSA: Correct. Yeah, I guess - - - a
24 stipulation, I guess, under CPLR principles, by definition,
25 imparts - - -



1 JUDGE FAHEY: All right.

2 MR. FILOSA: - - - a two-party agreement. Yes.

3 JUDGE FAHEY: So what you're saying is, is that
4 this isn't a pure one-party discontinuance; this is
5 instead, an agreement between the parties?

6 MR. FILOSA: Correct. And I think - - - I think
7 we've maintained that - - -

8 JUDGE FAHEY: All right. So let me take a step
9 back. So that being the case, the way I understood Judge
10 Wilson's question, then, was if you're agreeing, why
11 couldn't you include notice in the agreement? Notice of
12 the accelerated - - - of the reversion to a monthly
13 mortgage payment?

14 MR. FILOSA: Well, then there - - - well, look,
15 there I would agree that to the extent this stipulation
16 reflected - - - had express language of revocation, that
17 would be entirely permissible, because the parties, in that
18 instance, are allowed to expressly agree, even under the -
19 - -

20 JUDGE FAHEY: Right.

21 MR. FILOSA: - - - General Obligations Law, to
22 extend, reset - - -

23 JUDGE FAHEY: So what - - -

24 MR. FILOSA: - - - or postpone the statute.

25 JUDGE FAHEY: - - - so am I right in saying that



1 what you're asking for could have been done here in the
2 stipulated agreement? Is that correct?

3 MR. FILOSA: Correct. Even under the General
4 Obligations Law, yes. It could have been.

5 JUDGE FAHEY: I see. Thank you.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Mr. Sutherland?

8 MR. SUTHERLAND: Thank you, Your Honor. You
9 know, Mr. Engel's entire theory here is not only one that
10 is unreserved, but one that contradicts his admissions
11 below.

12 And he said on page 213 of the record that
13 Freedom Mortgage could have revoked its acceleration in,
14 "in a simple letter stating that it was revoking the
15 acceleration." That's paragraph 18 on page 213.

16 So the entire theory that he's offering now is
17 simply one that is unreserved. The purpose of the
18 stipulation was not to enter into a contract - - -

19 JUDGE RIVERA: Judge, if I may ask a question - -
20 -

21 MR. SUTHERLAND: - - - to public - - -

22 JUDGE RIVERA: - - - please?

23 CHIEF JUDGE DIFIORE: Yes, please.

24 JUDGE RIVERA: Thank you so much.

25 Counsel, I'm going to ask you - - - I think



1 you've heard it - - - the question I asked Mr. Engel's
2 attorney. Why can't we view it as what's extinguished is
3 the right to seek acceleration of the debt but not the
4 demand for the payment? Why can't we view it that way?

5 MR. SUTHERLAND: You can't view it that way
6 because the contract gives us the right to seek
7 acceleration in connection with any one of the distinct
8 defaults. And there's a default any time a borrower misses
9 a monthly payment.

10 We have a right to seek acceleration in
11 connection with any one of those defaults. And our second
12 foreclosure action is based on a series of distinct
13 defaults that occurred after 2008, all the way through the
14 time of the 2015 complaint. And as I - - - we already - -
15 -

16 JUDGE RIVERA: All right, I guess I'm not being
17 clear. And again, it may be because it's a radical way of
18 thinking about it that's not supported by doctrine.

19 No. My question is: why can't we see - - -
20 let's say we disagreed with you and we took the view of the
21 Appellate Division, and we say the action would otherwise
22 be time barred on the acceleration, on the foreclosure.
23 Why can't we view it as that's correct, but you're still
24 able to seek the payment of the debt. You just can't make
25 a demand for it to be paid up front - - - for all of it to



1 be paid upon a default. All you have to do is keep asking
2 for the payment.

3 MR. SUTHERLAND: Right. That is a hard question
4 for me to answer, because it's not one that's been offered
5 by any court or any party, even in the amicus briefs. So
6 it would be something new in this case.

7 JUDGE RIVERA: I understand.

8 MR. SUTHERLAND: I think that there - - -

9 JUDGE RIVERA: Is there a contractual provision
10 that prohibits that? Is there some understanding between
11 the parties that prohibits that? Is there come contractual
12 doctrine that would not allow us to look at the note and
13 the mortgage in that way?

14 MR. SUTHERLAND: Yes. Because both the note and
15 the mortgage say that even if we don't enforce a right, we
16 can do so again in the future, if we want to do that.
17 That's paragraph - - -

18 JUDGE RIVERA: So here you're - - - but here
19 you're arguing you did, and then you revoked it.

20 MR. SUTHERLAND: We did, and - - -

21 JUDGE RIVERA: So say you did, and so the day is
22 done. That is now extinguished. You don't get to do that
23 again.

24 MR. SUTHERLAND: Right. So our first cause of
25 action is gone. And we can't accelerate again in



1 connection with the March 2008 default, say. That would be
2 barred by res judicata or collateral estoppel; one of those
3 two.

4 We can't accelerate again in connection with the
5 March 2008 default, but we can accelerate in connection
6 with the 2013 defaults, the 2014 defaults, and the 2015
7 defaults. We can accelerate again, under this contract.

8 And I would like to return to Judge Wilson's
9 question about whether there's a practical difference. And
10 the question raises an excellent point. There is no
11 practical difference between a rule that says that
12 discontinuance automatically revokes an election to
13 accelerate and a rule requiring statements in a letter.

14 Either one of those rules going forward means
15 that the borrower has notice of what they have to do. But
16 the rule requiring an automatic deceleration based on the
17 discontinuance is even clearer, because there's nev - - -
18 then there's not a fight about what the particular language
19 in the letter says. So - - -

20 JUDGE RIVERA: I'm sorry, Chief - - -

21 JUDGE FEINMAN: Excuse me - - -

22 JUDGE RIVERA: - - - if I may on this? If I may
23 on this?

24 But - - - but counsel, I think, if I can circle
25 back to I believe it's Judge Fahey's initial questioning,



1 that again, would mean implying something as opposed to
2 adhering to our doctrines of contracts, which - - - which
3 would require express statements.

4 MR. SUTHERLAND: Well, to be absolutely clear - -
5 -

6 JUDGE RIVERA: And that's the difference.

7 MR. SUTHERLAND: We don't need Judge Wilson's
8 rule to win. Under principles of contract, we win, because
9 the evidence discloses that the lender made an election.
10 That's the point.

11 JUDGE FEINMAN: But - - -

12 MR. SUTHERLAND: By the way - - -

13 JUDGE FEINMAN: - - - but - - -

14 CHIEF JUDGE DIFIORE: Judge Feinman?

15 JUDGE FEINMAN: Just to finish up. So I want to
16 be clear. Under Judge Wilson's rule, you know, it doesn't
17 really matter: a) whether it's a stipulation or just a
18 voluntary discontinuance.

19 The discontinuance puts you on notice, as the
20 borrower, that you now have the option to resume monthly
21 payments?

22 MR. SUTHERLAND: Yes.

23 JUDGE FEINMAN: Is that what you're advocating?

24 MR. SUTHERLAND: That - - - our position is that
25 a motion to discontinue is an overt act by the lender; a



1 stipulation to discontinue is an overt act by the lender; a
2 letter from the lender to the borrower is an overt act.

3 What you're looking for, in my - - - in my view,
4 is evidence of an election not a contract to extend the
5 2008 limitations period. We're dealing with an entirely
6 separate limitations period, one that began in 2013.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. SUTHERLAND: Thank you, Your Honor.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Freedom Mortgage Corporation v. Herschel Engel, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: January 11, 2021

